No. 93-1140

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In The

Supreme Court of the United States

October Term, 1993

JAMES B. BEAM DISTILLING CO.,

Petitioner,

v.

STATE OF GEORGIA; ZELL MILLER, individually and as Governor of the State of Georgia; MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner; and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state procedural bar of lack of standing, or state reliance interests and equitable considerations preclude the refund of a liquor tax which had been ruled constitutional prior to payment, but which was later ruled invalid by the retroactive application of a new rule of federal law, where the tax was not challenged at the time of payment, the tax was collected in full by the claiming manufacturer from its ultimately liable wholesalers, and where the state expended the tax in good faith reliance for 45 years upon its validity?

2. Whether due process requires a state to refund a liquor tax validly imposed and voluntarily remitted, after a newly announced rule of constitutional law invalidating the tax is held to apply retroactively, where the state provided multiple predeprivation remedies by which the tax could have been challenged prior to payment and which were not pursued?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari to the Supreme Court of Georgia should be denied, because on remand the Georgia courts properly followed the mandate of this

[1] There was dispute below over whether, after substituting Georgia's current Governor, Zell Miller, Petitioner/Plaintiff could reinject Georgia's former Governor, Joe Frank Harris, into the case. In its final orders, the trial court excluded the former governor from the style. See Appendices B & C to the petition. Respondents thus use the trial court's style of the case.

Court and properly applied this Court's other decisions. The claim for refund of Petitioner James B. Beam Distilling Co. ("Beam") is barred by Petitioner's lack of standing under Georgia's refund statute and is precluded by the State's good faith reliance for 45 years upon the constitutionality of its liquor tax under the decisions of this Court, and due to the inequities of a refund in this case. Further, since Georgia provides ample predeprivation remedies which Petitioner did not pursue, due process is satisfied. Thus, Respondents (also referred to collectively herein as "the State") respectfully submit that the petition should be denied.

OPINIONS BELOW

The Georgia Supreme Court's opinion (sometimes referred to as "*Beam* (Ga. II)") is reported at 263 Ga. 609, 437 S.E.2d 782 (1993) (Appendix A to petition).[2] The unreported decisions of the Superior Court of Fulton County on remand are set out in Appendices B and C. Opinions from the first phase of this case are *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ___, 111 S. Ct. 2439 (1991) (Appendix D) (sometimes referred to as "*Beam* (U.S.)"); *James B. Beam Distilling Co. v. Georgia*, 259 Ga. 363, 382 S.E.2d 95 (1989) (Appendix E) (sometimes referred to as "*Beam* (Ga. I)"); and the initial, unreported decision of the Superior Court of Fulton County (Appendix F).

[2] Lettered Appendices (*e.g.*, A, B, etc.) are attached to the Petition for Writ of Certiorari. Numbered Appendices (*e.g.*, 1, 2, etc.) are attached to this Brief in Opposition.

JURISDICTION

Although Petitioner predicates jurisdiction upon 28 U.S.C. § 1257, review is precluded by an adequate and independent state ground for the decision below. The cause of action involved is a suit for refund under O.C.G.A. § 48-2-35 (Appendix MM), a refund provision in Georgia's Public Revenue Code. The Court's mandate for remand in this case expressly authorized consideration of any applicable procedural bars. The facts developed on remand and the prior, settled law of the State of Georgia establish that Beam lacks standing to obtain a refund under § 48-2-35 of taxes which were rebated to Beam by the ultimately liable wholesalers.

STATUTES AND OTHER PROVISIONS INVOLVED

In addition to the constitutional provisions and the Georgia statutes appended to the petition, the following Georgia statutes and rules are also involved and are appended to this Brief in Opposition: O.C.G.A. §§ 3-2-13 (Appendix 1), 3-2-14 (Appendix 2), 3-2-35(d) & (e) (Appendix 3), 3-4-152 (Appendix 4), 9-4-10 (Appendix 5), 9-11-15(a), (b) & (c) (Appendix 6), 48-3-1 (Appendix 7), 50-13-10 (Appendix 8), 50-13-13 (Appendix 9), 50-13-19 (Appendix 10), 50-13-20 (Appendix 11); Georgia Revenue Rules 560-1-1-.10 (Appendix 12), 560-1-1-.11 (Appendix 13), 560-1-1-.12 (Appendix 14), 560-1-1-.13 (Appendix 15), 560-1-1-.14 (Appendix 16), and Chp. 560-2-9 (Appendix 17).

STATEMENT OF THE CASE

Petitioner brought this state court action for a refund under O.C.G.A. § 48-2-35 (Appendix MM), for liquor taxes paid in 1982-84 under Georgia's liquor tax statute which had been enacted in 1938. *See* O.C.G.A. § 3-4-60 (pre-1985 version) (Appendix EE). Beam challenged the tax under *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984).[3] The trial court held that the 1938 tax unconstitutionally discriminated in favor of distilled spirits manufactured from Georgia-grown products, but applied its ruling prospectively, and the Georgia Supreme Court affirmed. *Beam* (Ga. I), 259 Ga. 363, 382 S.E.2d 95 (1989).

This Court reversed the prospectivity ruling and remanded on all remedial issues. *Beam* (U.S.), 111 S.Ct. 2439 (1991). The Court expressly preserved the State's right to raise procedural bars, reliance interests, and equitable considerations on remand:

> The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others *not barred by procedural requirements* or res judicata. We do not speculate as to the bounds or propriety of pure prospectivity.

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[3] Georgia's 1938 tax statute was amended in 1985 after this Court found a similar Hawaii statute to be violative of the Commerce Clause in *Bacchus*. A Commerce Clause challenge to the 1985 Georgia statute was rejected in *Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E.2d 190 (1987), *appeal dismissed*, 483 U.S. 1013 (1987).

> Nor do we speculate about the remedy that may be appropriate in this case; remedial issues were neither considered below nor argued to this Court, save for an effort by petitioner to buttress its claim by reference to our decision last Term in *McKesson*. As we have observed repeatedly, federal "issues of remedy . . . may well be intertwined with, or their consideration obviated by, issues of state law." *Bacchus*, ... Nothing we say here deprives respondent [State of Georgia] of [its] opportunity to raise *procedural bars to recovery under state law or demonstrate reliance interests* entitled to consideration in determining the nature of the remedy that must be provided, a matter with which *McKesson* did not deal. See *Estate of Donnelly*, 397 U.S., at 296 . . . ; cf. *Lemon*, 411 U.S., at 203. . . .
>
> The judgment is reversed, and the case is remanded for further proceedings.

111 S.Ct. at 2448 (emphasis added).[4]

The Georgia Supreme Court, in turn, remanded the case to the trial court "for further proceedings consistent with the decision of the United States Supreme Court."

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[4] The role of procedural bars, reliance interests, and equitable considerations in the remedial context of a case like this were also mentioned elsewhere in the various opinions written in *Beam* (U.S.), *e.g.*, 111 S.Ct. at 2443 (Souter, J.) (noting that even full retroactivity is limited by res judicata and procedural barriers such as statutes of limitations); 111 S.Ct. at 2446-47 (Souter, J.) (retroactivity in civil cases is limited "by state procedural requirements"); 111 S.Ct. at 2450 (Blackmun, J., concurring) (rule of retroactivity adopted today "is not the remedial equity that the dissent seems to [discuss]"); 111 S.Ct. 2451-56 (O'Connor, J., dissenting) (discussing equitable considerations and the case of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)).

Appendix B, p. B4. The parties engaged in discovery, and Beam amended its complaint and the State amended its answer.[5] R. (S93A1217) 1132, 1149, 9, 76. The additional evidence presented on remand established the following facts.

During 1982-84, Georgia's liquor tax was administered through the sale of stamps by the Revenue Department.[6] While either a wholesaler or a manufacturer could purchase or affix the stamps prior to the product being shipped to a retailer by the wholesaler, the wholesaler was ultimately liable for the tax and would reimburse the manufacturer for the tax when the manufacturer had purchased the stamps first. *See* R. (S93A1217) 118-19.[7]

Beam manufactures distilled spirits outside Georgia and sells them to its wholesalers in Georgia under Georgia's three-tier system.[8] During 1982-84, when Beam purchased liquor stamps the rate for its products was $1.00

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[5] The defenses raised in the State's original Answer and Amended Answer were properly before the court both under this Court's mandate and under Georgia law. *See* O.C.G.A. § 9-11-15(a), (b) & (c) (Appendix 6); *McDonough Construction Co. v. McLendon Electric Co.*, 242 Ga. 510, 515, 250 S.E.2d 424, 429 (1978).

[6] Effective February 1, 1993, stamps were eliminated, and the tax is now collected exclusively from the wholesalers through a reporting system. O.C.G.A. § 3-4-61 (1993 Supp.).

[7] O.C.G.A. § 3-4-61(a)(2) (pre-1992 version, which is applicable in the instant case) (Appendix FF) provided: "Before shipment or delivery to any retailer, every manufacturer or wholesaler shall affix or cause to be affixed to each bottle or container of distilled spirits a stamp indicating the payment of the proper amount of tax".

[8] The three tiers are manufacturer, wholesaler and retailer. The tiers must remain distinct, and only wholesalers can ship to

per liter.[9] Beam seeks a refund of the full $1.00 per liter,[10] even though all claimed amounts were collected by Beam from its ultimately liable Georgia wholesalers, separately from the price of the distilled spirits. R. (S93A1217) 120, 130-241, 279-80; T. 9. All pending refund claims awaiting resolution of the instant case for pre-1985 taxes equal $31,700,000, and with claimed interest the total is $60,000,000. R. (S93A1217) 123.

The taxes in question were paid to the State without challenge to their validity and without actual threat of collection, criminal prosecution, or other sanction. R. (S93A1217) 120-22. The State expended these taxes for public works, programs and services, without reserve or contingency and in good faith reliance upon their validity. R. (S93A1217) 259. In particular, the State relied upon the upholding of the tax against a Commerce Clause challenge in *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939),[11] as well as upon the Twenty-first Amendment to the United States Constitution and decisions of this Court such as *State Bd. of Equalization of California v. Young's*

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retailers. Manufacturers are granted exclusive sales territories for their products, through their designation of exclusive wholesale distributors. *See* O.C.G.A. § 3-4-152 (Appendix 4).

[9] The tax rate for distilled spirits manufactured from Georgia-grown products during the same period was $.50 per liter. O.C.G.A. § 3-4-60 (pre-1985 version) (Appendix EE).

[10] However, as noted in *McKesson Corp. v. Florida Alcoholic Beverages & Tobacco Div.*, 496 U.S. 18, 49 n. 33 (1990), the federal constitution does not contemplate a refund of more than the discriminatory portion of such a tax.

[11] Overruled on other grounds in *Blackston v. Georgia Dep't of Natural Resources*, 255 Ga. 15, 334 S.E. 2d 679 (1985).

Market Co., 299 U.S. 59 (1936). R. (S93A1217) 250. Georgia's liquor industry also considered the tax constitutional until *Bacchus*. *Id.*

The facts adduced on remand established that Georgia and its public programs and citizens would suffer if the State were now required to refund these taxes, R. (S93A1217) 261-63, 266, 273-74, and that when Beam purchased liquor stamps in 1982-84 it did not avail itself of any of the multiple predeprivation remedies that were available to challenge Georgia's liquor laws, R. (S93A1217) 122, 252-53.

On cross-motions for summary judgment, the trial court entered judgment for the State on several distinct grounds, including the procedural bar under § 48-2-35 (Appendix MM) that a party who remits a tax to the State does not have standing to recover the tax if the party has been reimbursed for the tax by its purchaser; based upon State reliance interests and equitable considerations; and due to the existence of predeprivation remedies which were found to satisfy due process. Trial court order, Appendix B, pp. B8-B12.[12] On appeal, the Georgia Supreme Court affirmed on the ground of Beam's lack of standing to obtain a refund under § 48-2-35, and due to the existence of multiple state predeprivation remedies

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[12] After final decision by the trial court on remand, Beam advanced a claim under 42 U.S.C. § 1983 and directly under the United States Constitution for a refund; and the trial court rejected those claims, which were essentially based upon the same due process argument previously made by Beam. R. (S93A1218) 6; App. C.

which were found to satisfy due process. *Beam* (Ga. II), Appendix A.[13]

Response To Petitioner's Statement Of The Case

Petitioner's Statement of the Case is argumentative and contains misstatements.[14]

Beam mischaracterizes Georgia's alcohol system during 1982-84. As the Georgia Supreme Court confirmed in its decision below, liability for the distilled spirits tax was ultimately imposed upon the wholesaler, whatever the arrangement settled upon by the manufacturer and wholesaler for actually purchasing and affixing the tax stamps before the wholesaler's shipment to the retailer. *See Beam* (Ga. II), Appendix A, pp. A3-A4; O.C.G.A. § 3-4-61(a)(2) (Appendix FF).[15] Often, manufacturers purchased and affixed stamps prior to shipment to the Georgia wholesaler, but in such cases the manufacturer was, in very real effect, the State's collection agent in collecting the tax from the ultimately liable wholesaler. Once the

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[13] The court did not reach Beam's 42 U.S.C. § 1983 related claims, which the State argued were barred by the statute of limitations and for other reasons. R. (S93A1218) Appellees' Brief. *See, e.g., Owens v. Okure*, 488 U.S. 235, 236 (1989); O.C.G.A. § 9-3-33 (two year general personal injury statute of limitations).

[14] The negative remarks at pp. 4-5 of the petition regarding the courts and the other parties below are not only incorrect, but particularly inappropriate. *See generally* U.S. Sup. Ct. Rule 24.6 ("A brief must be . . . free from . . . scandalous matter"). The Georgia courts and Respondents have at all times followed this Court's mandate and guidelines for remand.

[15] *See also* O.C.G.A. § 3-2-11(2) (App. U) (further indicating the liability of the wholesaler and of the importer).

manufacturer so collected the tax, the wholesaler became the real party in interest for this claim for refund. The price of the alcohol product to the wholesaler did not change, and the wholesaler did not pay the tax to Beam to acquire the goods, but to satisfy its own tax liability.

Beam is also incorrect in asserting that Respondents and "everyone involved in the case" agreed that § 48-2-35 "was the remedy available to the Petitioner."[16] During the first phase of this case, what everyone focused upon was obtaining a resolution on the merits of the constitutional challenge, and, as this Court noted in *Beam* (U.S.), 111 S.Ct. at 2448, "remedial issues were neither considered below nor argued to this Court." It was only after a ruling of retroactivity for the federal rule of law that remedial issues became relevant, and Beam is incorrect in implying that Respondents admitted that the refund remedy contended for by Beam would ever be proper in this case. In fact, during oral argument before this Court,

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[16] Petition, p. 4. Quite to the contrary, the State argued below that the more specific credit/refund provisions in the Alcoholic Beverages Code, O.C.G.A. §§ 3-2-13 (App. 1) and 3-2-14 (App. 2), were either the governing remedial provisions or, at the very least, must be read in conjunction with the general refund statute contained in the Public Revenue Code, O.C.G.A. § 48-2-35. R. (S93A1217) 329. That argument was not reached by the courts below. *E.g.*, trial court order, App. B, p. B12 n. 4.

Respondents expressly pointed out that there had not yet been a decision on that issue.[17]

Petitioner mischaracterizes the decisions of the Georgia courts and ignores the "standing" decisions under § 48-2-35 which were extant long before *Bacchus*. For example, in *Reich*,[18] a federal retiree sought a refund of

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[17] Transcript of Oral Argument (October 30, 1990), pp. 24-25:

> "Q. Do we assume that Georgia would provide a refund here if we agree with the petitioner on the retroactivity of *Bacchus*?
>
> "Ms. Baker [Counsel for the State]: I don't think that we would agree that –
>
> "Q. Or has that been decided?
>
> "Ms. Baker: That issue has not been addressed by any court so far in the State of Georgia. And that issue, I think, would be open to be decided on a remand of this case, not inconsistent with the principles announced in the *McKesson* case. . . ."

Ms. Baker went on to point out, *inter alia*, the availability of injunctive relief in Georgia for challenges to unconstitutional tax statutes and to comment that reliance interests and equitable considerations were important to a resolution of the refund issue. *Id.* at 26-27, 29-30.

[18] The *Reich* cases involved Georgia income taxation of federal retirees in light of *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989) and, more recently, in light of *Harper v. Virginia Dep't of Taxation*, 509 U.S. ___, 113 S.Ct. 2510 (1993). In *Reich v. Collins*, 262 Ga. 625, 422 S.E.2d 846 (1992) ("*Reich I*"), *vacated and remanded*, 61 U.S.L.W. 3867 (June 28, 1993), the court held Georgia's tax unconstitutional under *Davis* and retroactively so under *Beam* (U.S.), but concluded that no refund was due as a matter of state law. In *Reich v. Collins*, 263 Ga. 602, 437 S.E.2d 320 (1993) ("*Reich II*"), the court ruled that the taxpayer's waiver of adequate predeprivation remedies under Georgia law negated a due process argument for a refund.

Georgia income taxes under § 48-2-35, raising in *Reich II* due process arguments roughly similar to Petitioner's due process arguments in the instant case. Since *Reich II* is pending before this Court on petition for writ of certiorari, Petitioner in the instant case appears to be making a thinly veiled attempt to support the *Reich* petition and to give the impression that that case and the instant one are inextricably interdependent. Even a cursory reading of the decision below in the instant case shows that the two cases have important differences and that the *Reich* decisions are essentially irrelevant to the instant case. In *Beam* (Ga. II) the Georgia Supreme Court assumed *arguendo* that Beam's cause of action under § 48-2-35 could lie, as Beam vigorously asserted, but ruled, under clearly established Georgia law pertaining to that Code section and on the undisputed facts of this case, that Beam lacked standing to obtain a refund of taxes which it had collected from its ultimately liable wholesalers. Petitioner's usage of the *Reich* decisions in its petition appears designed to confuse the Georgia law and the ruling in *Beam* (Ga. II), in order to set up Petitioner's later, incorrect argument that Georgia provides no "clear" remedy.

Petitioner's final description, at pp. 8-10 of the petition, of the decision below is convoluted, with Petitioner at one point quoting its own inaccurate paraphrase of the court's holding. There is no ambiguity in the decision below: the court concluded that under established state law applicable to refund actions under § 48-2-35, Beam lacked standing to obtain a refund of taxes which it collected, as taxes, from its dually and ultimately liable wholesalers, and that Beam's failure to avail itself of

adequate predeprivation remedies prior to payment of the taxes vitiated Beam's due process argument.[19]

Petitioner's (mistaken) reliance upon matters outside the record is inappropriate. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-58 n.16 (1970). The Georgia casual sales tax litigation referred to at page 11 of the petition is also irrelevant to the legal issues presented by the petition.[20]

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW WAS BASED UPON AN ADEQUATE AND INDEPENDENT STATE GROUND.

"It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on

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[19] The decision below in *Beam* (Ga. II) was unanimous as to Beam's lack of standing, and two justices dissented on the due process issue. App. A.

[20] The sales tax case of *Tedder v. Collins*, Cobb Superior Court, State of Georgia, Civil Action No. 93-1-5530-28 (1993) was a declaratory judgment action to challenge the promulgation of an administrative regulation concerning Georgia's taxation of "casual sales". That case is merely another example of how Georgia's predeprivation remedies, including declaratory judgment and injunctive relief, provide a clear, prompt, and adequate procedure to challenge the validity of a tax and to seek an escrow account or other appropriate equitable relief. Since the facts and the legal issues in that case are different from the instant case, to the extent Beam may attempt to imply an equal protection problem, it is both non-existent and not present as an issue in the instant case.

independent and adequate state grounds, even where those judgments also decide federal questions." *Henry v. Mississippi*, 379 U.S. 443, 446 (1965). *See also Michigan v. Long*, 463 U.S. 1032, 1038 n.4 (1983).

The instant case was remanded by this Court for a consideration of remedial issues, including state procedural bars. *Beam* (U.S.), 111 S.Ct. at 2448. *See also id.* at 2442 ("the remedial inquiry is one governed by state law"). *Cf. Harper v. Virginia Dep't of Taxation*, 509 U.S. ___, 113 S.Ct. 2510, 2520 (1993) (leaving to state courts the remedial questions of state law).

The state ground in the decision below is clear from the face of the opinion, *i.e.*, that Beam lacks standing under O.C.G.A. § 48-2-35 to obtain a refund of taxes which its wholesalers paid to Beam to satisfy their own tax liability. The ruling not only has fair and substantial support under Georgia law, but the exclusive and well-established line of authority on point under § 48-2-35 makes the standing requirement clear. *See Eimco BSP Services Co. v. Chilivis*, 241 Ga. 263, 268, 244 S.E.2d 829 (1978); *Blackmon v. Georgia Independent Oilmen's Ass'n*, 129 Ga. App. 171, 174, 198 S.E.2d 896, 900 (1973); *Blackmon v. Premium Oil Stations, Inc.*, 129 Ga. App. 169, 170, 198 S.E.2d 900, 902 (1973). *See also Atlanta Americana Motor Hotel Corp. v. Undercofler*, 222 Ga. 295, 149 S.E.2d 691 (1966).[21] While the prior Georgia cases involved sales

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[21] This Georgia rule is similar to the standing rule under federal tax refund statutes, upon which § 48-2-35 was modeled. *See Hawes v. Bigbie*, 123 Ga. App. 122, 123, 179 S.E.2d 660, 661-62 (1970) and decisions under federal refund statutes, *e.g.*, *United States v. Jefferson Electric Mfg. Co.*, 291 U.S. 386, 400, 402-03 (1934)

taxes (imposing dual liability upon sellers and purchasers of tangible personal property), they establish a clear rule under § 48-2-35 and which is readily seen to apply to the liquor taxes collected by Beam from its wholesalers in the instant case. *See Beam* (Ga.II), Appendix A, pp. A3-A4.

That the standing bar may be deemed procedural in the instant case does not preclude its adequacy, *see Henry v. Mississippi*, 379 U.S. at 447, because the procedural bar serves legitimate state interests, including protection of the public fisc against claims which would result, in effect, in unjust enrichment. The standing requirement does not preclude a recovery by a seller for taxes absorbed by the seller, but only for taxes reimbursed to

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("We cannot assent to the view that a court may give a judgment awarding the taxpayer a refund without inquiring whether he has borne the burden of the tax or has reimbursed himself by collecting it from the purchaser," since suits for refund proceed on equitable principles); *Travel Industries of Kansas, Inc. v. United States*, 425 F.2d 1297, 1300 (10th Cir. 1970) (stating that taxpayer's argument that statutory tax refund suits do not involve equitable considerations "has no authoritative support of which we are aware," and refusing a refund which would be a windfall to plaintiff); *Sharp & Dohme, Inc. v. United States*, 144 F.2d 456, 458-59 (3d Cir. 1944) (common law rule is that plaintiff who collected the taxes from another and did not bear the burden of the taxes lacks standing to maintain an action for refund); *Lit v. United States*, 18 F. Supp. 435, 439 (E.D. Pa. 1937) (refund action is governed by equitable principles). *See also Atchison, Topeka & Sante Fe Ry. v. Lennen*, 732 F.2d 1495, 1506-07 (10th Cir. 1984) (denying on equitable grounds a refund under state law where the taxes were paid without protest and the government had already expended the revenues).

the seller by his ultimately liable purchaser, thus preventing a double recovery of the taxes *qua* taxes.[22]

II. THE DECISION BELOW WAS CORRECTLY DECIDED.

A. UNDER THIS COURT'S MANDATE FOR REMAND AND OTHER DECISIONS, THE STATE PROCEDURAL BAR, RELIANCE INTERESTS AND EQUITABLE CONSIDERATIONS PRECLUDE A REFUND TO PETITIONER IN THIS CASE.

In *Beam* (U.S.), 111 S.Ct. 2439, and *Harper*, 113 S.Ct. 2510, the Court shifted from the equitable balancing approach embodied in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) to a general rule of retroactivity for decisions which make new announcements of federal law. In light of the departure from *Chevron Oil's* approach to determining the applicable rule of law for controversies arising on facts predating the law-changing decision, state reliance interests, equitable considerations, and procedural bars are now appropriately, and importantly, relevant to questions of remedy and actual relief. This approach was

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[22] By analogy to the waiver doctrine, *see Henry v. Mississippi*, 379 U.S. at 448 n.3, it is also relevant in this context that Beam waived its opportunities to contest the tax prior to payment. Indeed, this Court has held that there is an adequate state ground where plaintiff chose the wrong remedy under local law. *Edelman v. California*, 344 U.S. 357, 361-62 (1953) (state provided another, proper remedy to test the constitutionality of a statute).

See also Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945) (if the same judgment would be rendered by the state court after a correction of its views of federal law, this Court's review would be an advisory opinion).

established and mandated for the instant case by the Court's decision of June 20, 1991. *See Beam* (U.S.), 111 S.Ct. at 2448 (individual equities, procedural requirements and procedural bars, as well as reliance interests, may properly be considered in resolving remedial issues on remand).

While this issue has not been squarely decided for the general case and was apparently reserved in *Harper*, decisions of the Court other than *Beam* (U.S.) strongly indicate that state procedural bars, reliance interests, and equitable considerations must be taken into account in determining whether any actual relief in the form of a refund of taxes held retroactively unconstitutional is to be afforded a particular claimant.[23]

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[23] *See Harper*, 113 S.Ct. 2510, 2516 n.9, 2522 n.1, 2525-26, 2536-38 (wherein four justices expressly stated that equitable considerations are relevant to the remedial inquiry and a fifth indicated that procedural defaults may occur in this context); *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 219-20, 223 (1990) (wherein the plurality of four justices applied the equitable balancing test of *Chevron Oil* and the four dissenting justices considered *Chevron Oil* and the cases upon which it was based to be remedy cases in which consideration of reliance interests could be appropriate); *Lemon v. Kurtzman*, 411 U.S. 192, 198-99, 203, 207-09 (1973) (deciding state remedial issues on the basis of equitable reliance interests of the state as to the validity of the state statute during the period before it had been declared unconstitutional, and noting that state officials and those with whom they deal are entitled to rely on a presumptively valid state statute); *United States v. Estate of Donnelly*, 397 U.S. 286, 296-97 (1969) (Harlan, J., concurring, indicating that reliance interests and other equitable considerations should be taken into account in the determination of what "relief" is appropriate in any given case and stating: "There are, of course, circumstances when a change in the law will jeopardize an edifice

Application of these three factors in the remedial context of the instant case is a sound and appropriate rule. A refund to Petitioner is not warranted where the claimant lacks standing (as discussed in the preceding section of this Brief) and where the State's reliance interests and equitable considerations are superior.[24]

The instant case involves Georgia's pre-*Bacchus* tax statute, the validity of which had been relied upon by the State, and by the alcohol industry doing business in Georgia, since its upholding in 1939. R.(S93A1217) 250. Not only was the statute presumptively valid, it had been expressly upheld under the Commerce Clause, based upon this Court's *Young's Market* line of decisions. *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939). Neither Beam nor anyone else challenged the validity of the tax prior to making the tax payments in question. R.(S93A1217) 122. Beam has fully recouped the taxes involved in its refund

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which was reasonably constructed on the foundation of prevailing legal doctrine. Thus, it may be that the law of remedies would permit rescission, for example, but not an award of damages to a party who finds himself able to avoid a once-valid contract under new notions of public policy"); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969).

[24] The trial court based its denial of a refund upon the State's reliance interests and equitable considerations, in addition to other grounds. Appendix B, p. B9. The Georgia Supreme Court did not address reliance interests and equitable considerations in reaching its conclusion that no refund was due, even though such matters were argued to that court. R.(S93A1217) Appellees' Brief. However, "a respondent or appellee may support the judgment in his favor upon grounds different from those upon which the court below rested its decision." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

claim. R.(S93A1217) 120. Thus, a refund would provide a double recovery of these amounts to Beam, to the detriment of other taxpayers. R.(S93A1217) 262-63. Indeed, each court which has considered the State's reliance interests and equitable considerations, for any purpose in the instant matter, has easily concluded that such factors weigh out in favor of the State in this case. *See, e.g., Beam* (U.S.), 111 S.Ct. at 2455-56 (O'Connor, J., dissenting); *Beam* (Ga. I), 259 Ga. 363, 382 S.E.2d 95 (1989); *Beam* (trial court II), Appendix B, p. B9.

B. DUE PROCESS IS SATISFIED BY MULTIPLE PREDEPRIVATION REMEDIES WHICH PETITIONER FAILED TO AVAIL ITSELF OF PRIOR TO PAYMENT OF THE TAX.

This Court has made it clear in both *Harper,* 113 S.Ct. 2510 and *McKesson Corp. v. Florida Alcoholic Beverages & Tobacco Div.,* 496 U.S. 18 (1990) that due process is satisfied in a case like the instant one when the state provides adequate predeprivation remedies:

> If Virginia "offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing," the "availability of a predeprivation hearing constitutes a procedural safeguard . . . sufficient by itself to satisfy the Due Process Clause."

Harper, 113 S.Ct. at 2519 (quoting *McKesson,* 496 U.S. at 38 n.21). The Court further stated that "*if* no such predeprivation remedy exists," due process obligates the state "to provide meaningful backward-looking relief to

rectify any unconstitutional deprivation." *Id.* (emphasis added). The Court also reaffirmed in *Harper* that:

> The constitutional sufficiency of any remedy thus turns (at least initially) on whether Virginia law "provide[s] a[n] [adequate] form of 'pre-deprivation process,' *for example, by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding.*"

Harper, 113 S.Ct. at 2520 (again quoting *McKesson,* 496 U.S. at 36-37) (emphasis added).

At all relevant times, taxpayers in Georgia have been authorized to bring suit to enjoin imposition of an allegedly unconstitutional tax prior to its payment, and Georgia has also provided other remedies allowing an alcohol taxpayer like Petitioner to withhold payment and interpose their objections as defenses in a tax enforcement proceeding. Petitioner acknowledges, as it must, that as long as Georgia provides at least one clear pre-deprivation remedy, due process is satisfied. Petition, p. 16. There is no merit to Petitioner's efforts to obfuscate Georgia's remedies, nor to its "duress" argument. In essence, Petitioner's duress argument rests upon its erroneous assertions regarding the nature of Georgia's alcoholic beverages regulatory system. However, that detailed system and Georgia's liberal set of pre-deprivation procedures amply protect the due process rights of alcohol licensees and taxpayers.[25]

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[25] As discussed in the Statement of the Case, Beam attempts to negate the dual liability feature of the liquor tax, and to give

1. Georgia Provides Adequate Predeprivation Remedies.

Suit to enjoin tax. The availability of a suit for injunctive relief to challenge the constitutionality of an alcohol tax, or other tax provision or alcohol regulation, has long been recognized in Georgia. *See, e.g., Heublein, Inc. v. State,* 256 Ga. 578, 351 S.E.2d 190 (1987), *appeal dismissed,* 483 U.S. 1013 (1987) (suit for declaratory and injunctive relief challenging the constitutionality under the Commerce Clause of Georgia's 1985 distilled spirits taxes); *Blackmon v. Golia,* 231 Ga. 381, 202 S.E.2d 186 (1973) (suit for injunctive relief entertained to challenge constitutionality of alcohol tax statute, and tax struck down as unconstitutional); *Parrish v. Employees' Retirement System,* 260 Ga. 613, 398 S.E.2d 353 (1990), *cert. denied,* 111 S.Ct. 2016 (1991); *State v. Private Truck Council of America, Inc.,* 258 Ga. 531, 371 S.E.2d 378 (1988); *City Council of Augusta v. Mangelly,* 243 Ga. 358, 254 S.E.2d 315 (1979); *Rogers v. DeKalb County Bd. of Tax Assessors,* 247 Ga. 726, 279 S.E.2d 223 (1981); *Wages v. Michelin Tire Corp.,* 233 Ga. 712, 214 S.E.2d 349 (1975), *aff'd,* 423 U.S. 276 (1976); *Richmond County Property Owner's Ass'n v. Augusta-Richmond County Coliseum Authority,* 233 Ga. 94, 210 S.E.2d 172 (1974); *City of Lithonia v. DeKalb County Bd. of Educ.,* 231 Ga. 150, 200 S.E.2d 698 (1973); *Robbins v. City of Rome,*

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the impression that only Beam could purchase tax stamps and that it could not do business in Georgia otherwise. The Georgia Supreme Court expressly rejected that argument in light of O.C.G.A. § 3-4-61(a)(2) (App. FF). *Beam* (Ga. II), App. A, pp. A3-A4.

230 Ga. 901, 199 S.E.2d 802 (1973); *DeKalb County v. Allstate Beer, Inc.*, 229 Ga. 483, 192 S.E.2d 342 (1972). *See also Noble v. Joint City-County Bd. of Tax Assessors of Fulton County*, 672 F.2d 872, 875 (11th Cir. 1982); *Adams v. Smith*, 415 F. Supp. 787 (N.D. Ga. 1976), *aff'd*, 568 F.2d 1232 (11th Cir. 1978); *City of Atlanta v. Spence*, 242 Ga. 194, 249 S.E.2d 554 (1978); *Blackmon v. Alexander*, 233 Ga. 832, 213 S.E.2d 842 (1975).

Thus, even if every one of Beam's disputed characterizations of Georgia's alcohol system were correct, the Georgia courts have consistently entertained suits in equity to enjoin and to rule upon the constitutionality of a Georgia tax.

Suit for declaratory judgment. Georgia law also provides for declaratory judgment suits to challenge the constitutionality of alcoholic beverages statutes or other statutes, including issuance of injunctions as a part of such action. *See* O.C.G.A. §§ 9-4-1 (Appendix GG), 9-4-2 (Appendix HH), 9-4-3(b) (Appendix II), 9-4-10 (Appendix 5); *Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E.2d 190 (1987); *Gravely v. Bacon*, 263 Ga. 203, 429 S.E.2d 663 (1993); *Clein v. Kaplan*, 201 Ga. 396, 40 S.E.2d 133 (1946).

Petitioner's reliance upon the cases cited in footnote 17, on page 29 of the petition, and others which are discussed in the text of the petition is misplaced. Those cases mainly concern the general rule that courts of equity have some discretion and that an adequate remedy at law may preclude a suit in equity, or they address special circumstances in which a declaratory judgment

action may be inappropriate. However, as is clearly indicated by the cases cited in the preceding three paragraphs, the Georgia courts do indeed entertain suits in equity to resolve constitutional challenges to taxes. Petitioner's declaratory judgment and other cases are distinguishable, as involving other situations, such as where a party has begun an appeal remedy which will provide judicial review and then seeks to abandon that remedy for a declaratory judgment action. *See, e.g., Newsome v. Brown,* 252 Ga. 421, 314 S.E.2d 225 (1984). Any overly broad dicta in those cases is not controlling in the situation of an allegedly unconstitutional tax, and the Georgia Supreme Court properly rejected Beam's arguments below, which were based upon essentially the same authorities cited to this Court by Beam.

Tax Enforcement Proceedings. Georgia also provides multiple procedures in which an alcohol taxpayer may interpose his objections to the tax prior to payment, as defenses in a tax enforcement proceeding. A remedy which is commonly employed by alcohol taxpayers is to appeal from a deficiency assessment issued by the Georgia Revenue Department prior to paying a disputed tax. Section 3-2-11(2) (Appendix U) of the Georgia Code expressly provides for appeals by wholesalers or manufacturer/importers under Georgia's Administrative Procedure Act ("APA"). The APA contains both a general appeal remedy and an additional remedy for appealing from any decision, action or inaction of the Revenue Department involving taxes. O.C.G.A. §§ 50-13-13 (Appendix 9), 50-13-12 (Appendix TT). The APA provides for a full administrative hearing, followed by judicial review to resolve constitutional and legal issues.

O.C.G.A. §§ 50-13-13 (Appendix 9), 50-13-19 (Appendix 10), 50-13-20 (Appendix 11). Under this remedy, a constitutional challenge must be raised at the administrative level, but is decided by the superior court and thereafter by the appellate courts. *See, e.g.*, O.C.G.A. § 50-13-19(h) (Appendix 10); *Flint River Mills v. Henry*, 234 Ga. 385, 386-87, 216 S.E.2d 895, 896-97 (1975); *Flowers v. Georgia Real Estate Comm'n*, 141 Ga. App. 105, 232 S.E.2d 586 (1977); *Department of Public Safety v. Foreman*, 130 Ga. App. 71, 202 S.E.2d 196 (1973). *See also Georgia Real Estate Comm'n v. Horne*, 141 Ga. App. 226, 233 S.E.2d 16 (1977).

Other pre-enforcement procedures are also provided by Georgia, including O.C.G.A. §§ 48-2-54 (Appendix PP) (state suit to collect taxes, in which taxpayer may raise objections to the tax), 48-3-1 (Appendix 7) (affidavit of illegality action by taxpayer in superior court to challenge tax which state attempts to collect by levy), and 50-13-10 (Appendix 8) and 50-13-11 (Appendix SS) (procedure for administrative declaratory rulings followed by superior court and appellate court review). *See* Ga. Revenue Rules 560-1-1-.10, *et seq.* (Appendices 11-15).

2. There Is No Merit To The "Duress" Argument.

With no actual threat of sanctions against it in this case, Petitioner mainly argues that the alleged risk of criminal prosecution, seizure of its alcoholic beverages as contraband, or the suspension or cancellation of its liquor license constituted duress or potential sanctions which should be deemed to negate the adequacy of Georgia's

predeprivation remedies. There is no merit to this contention.

Petitioner's assertions are based upon extreme and erroneous characterizations of Georgia's Alcoholic Beverages Code. For example, the contraband statute provides that, "[e]xcept as otherwise specifically provided for by law," non-tax-paid alcohol is contraband. O.C.G.A. § 3-2-33 (Appendix W). Similarly, the criminal provisions only apply to violations of "this title [*i.e.* the Alcoholic Beverages Code, O.C.G.A Title 3]." *See, e.g.*, O.C.G.A. §§ 3-2-36 (Appendix Y), 3-3-27 (Appendix CC). Beam, however, seeks to ignore O.C.G.A. § 3-4-61(a)(2) (Appendix FF) altogether, because it only required tax stamps to be affixed by the time the liquor left the Georgia wholesaler's warehouse for the Georgia retailer. *Beam* (Ga. II), Appendix A, pp. A3-A4. What the law allowed, the Revenue Department could not prosecute or otherwise punish.[26]

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[26] Beam's argument based upon Ga. Revenue Rule 560-2-3-.09 ignores the full statutory scheme, and was properly rejected by the Georgia Supreme Court below. Under O.C.G.A. § 3-4-61(a)(2) (App. FF), the Revenue Department could not, and did not, consider the delivery by a manufacturer of distilled spirits to its licensed, designated wholesaler without tax stamps affixed to be a crime, nor to be contraband which could be seized, nor to be a ground for suspending or cancelling the manufacturer's or wholesaler's liquor license. R.(S93A1217) 120-21. Indeed, no such criminal prosecution, seizure, or action against a manufacturer or the manufacturer's liquor license has ever been brought. *See id.*

Further, even assuming *arguendo* that there could be merit to Beam's arguments, Georgia offers further due process protections by providing a hearing procedure for alcoholic beverages detained as suspected contraband and before

In addition, the mere accrual of interest upon unpaid taxes,[27] if they are ultimately found to be constitutional and due, does not invalidate a predeprivation remedy, and *McKesson* and the other decisions of this Court should not be so read. *See generally United States v. Childs*, 266 U.S. 304, 307 (1924) ("interest [is merely] a means of compensation" to protect against the loss of the time-value of money). Similar considerations should apply regarding Georgia's 10% civil penalty for failure to pay alcohol taxes.[28] *See generally Reisman v. Caplin*, 375 U.S. 440, 446-47 (1964) (IRS contempt penalties); *Ford Motor Co. v. Coleman*, 402 F. Supp. 475, 484 (D. D.C. 1975), *aff'd*, 425 U.S. 927 (1976) (civil penalties on auto manufacturers; "the Constitution is offended [only] when the penalty system . . . create[s] a virtual roadblock to judicial review"). Indeed, Georgia's nonpayment penalty is waivable when a taxpayer has a good faith, reasonable basis for his refusal to pay, *see* O.C.G.A. § 3-2-12 (Appendix V),

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disposition, O.C.G.A. § 3-2-35(d)&(e) (App. 3), and also provides for a hearing from an alcohol license citation prior to any actual suspension or denial of the license, O.C.G.A. § 3-2-3(1) (App. T); Ga. Revenue Rules Chp. 560-2-9 (App. 17).

Finally, even if Beam could have faced criminal exposure, a court of equity would have intervened to prevent injury to an alcohol licensee who was seeking a decision on an allegedly unconstitutional statute. *See Harris v. Entertainment Systems, Inc.*, 259 Ga. 701, 386 S.E.2d 140 (1989).

[27] *See* O.C.G.A. § 3-2-11(5) (App. U) (providing for interest at the rate of 1 percent per month on unpaid alcohol taxes).

[28] *See* O.C.G.A. §§ 3-2-11(3) (App. U), 48-2-44(a) (App. OO) (penalty for willful failure to pay). The fraud penalty is irrelevant to a case of this type. *See* O.C.G.A. § 3-2-11(4) (App. U).

which a good faith constitutional challenge to the validity of the alcohol tax would be.[29]

Petitioner's reliance upon *Atchison, Topeka & Sante Fe Ry. v. O'Connor,* 223 U.S. 280 (1912) is also misplaced. That case involved a state remedial system which the Court assumed provided no suit in equity and no appeal procedures, as Georgia does provide, and a tax statute which automatically forfeited the company's right to do business in the state if the company failed to pay the tax. 223 U.S. at 285. In addition, in that case the taxpayer put the state on notice, at the time of payment, of its dispute over the validity of the tax. 223 U.S. at 287. The instant Georgia situation involves none of those factors.

Similarly, *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1930) is inapposite. That case involved a situation where there was no procedural remedy available at any time under state law for the plaintiff. 281 U.S. at 678-79. While Petitioner tries to use that case to support an argument that *Reich I,* 262 Ga. 625, 422 S.E.2d 846, deprived Beam of due process by ruling § 48-2-35 inapplicable to the federal retiree therein, Beam ignores the fact that the Georgia courts in the instant case assumed *arguendo* (as Beam had asserted) that § 48-2-35 could be available to Beam. *See also Brinkerhoff,* 281 U.S. at 681 n.8

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[29] In addition, the requirement of a surety bond to pursue a remedy such as that provided by O.C.G.A. §§ 48-3-1 (App. 7) or 48-2-59 (App. RR) also does not violate due process. *See Ownbey v. Morgan,* 256 U.S. 94, 108-12 (1921); *McMillen v. Anderson,* 95 U.S. 37, 42 (1877). *See generally Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 551-52 (1949).

([even] a change in state court decisions generally does not offend constitutional guarantees).

Also inapplicable is *Ward v. Board of County Comm'rs*, 253 U.S. 17 (1920), which involved actual governmental threats to collect a tax by seizing and selling realty and where the county failed to respect a federal exemption. On those facts, the Court concluded that the state court's finding that the taxes were paid voluntarily was without any fair or substantial support. *Ward* also recognized that state procedural bars in force when the claim was filed may be applied in a suit to recover taxes. 253 U.S. at 25.

C. THERE IS NO MERIT TO PETITIONER'S OTHER ARGUMENTS.

Petitioner's heavy reliance upon *McKesson* overlooks the fact that the instant case involves a 1938, pre-*Bacchus* statute which everyone considered to be constitutional, while *McKesson* involved a post-*Bacchus* statute which made only cosmetic changes to the prior statute and thus violated clearly established law. *McKesson*, 496 U.S. at 46.[30]

Beam's other arguments are equally without merit. For example, Beam erroneously asserts that certain Georgia cases which generally involved § 48-2-35, *e.g.*, petition, p. 24, impliedly precluded Beam from pursuing

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[30] Beam also misunderstands the Florida remedial situation which this Court interpreted in *McKesson* to be inadequate. *See, e.g.*, F.S.A. § 72.011 (authorizing appeals from assessments of various taxes, but *omitting* alcohol taxes [imposed under chapters 564 and 565]).

other, distinct statutory and judicial remedies. Beam's additional efforts to inject the *Reich* case into the instant one, for example by asserting at p. 30 of the petition that *Reich* imposed a protest requirement upon Beam in the instant matter, are baseless. Also in citing the *Heublein* trial court decision (App. P) denying temporary injunctive relief, Beam neglects to point out that the manufacturer did not appeal that decision, but merely pursued its claim for a declaratory judgment on the constitutional issue, which it obtained.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully submit that the Petition for Writ of Certiorari to the Supreme Court of Georgia should be denied.

Respectfully submitted,

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No. 93-1140

In The

Supreme Court of the United States

October Term, 1993

JAMES B. BEAM DISTILLING CO.,

Petitioner,

v.

STATE OF GEORGIA; ZELL MILLER, individually and as Governor of the State of Georgia; MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner; and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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APPPENDIX 1

O.C.G.A. § 3-2-13. Issuance of refunds or credits for taxes paid or stamps purchased.

(a) The commissioner may issue refunds or credits for taxes paid by or due from a wholesaler or, in the case of taxes on distilled spirits, may issue refunds or credits for stamps purchased by a manufacturer, distiller, or wholesaler when it can be shown to the commissioner's satisfaction that any of the following events have occurred:

(1) Alcoholic beverages have been received by the wholesaler through an error in shipment and the alcoholic beverages are returned to the shipper prior to any sale by the wholesaler in this state;

(2) Alcoholic beverages ordered by the wholesaler have been destroyed in transit prior to entry into the wholesaler's warehouse or storage area;

(3) Alcoholic beverages which are unfit for consumption upon receipt have been received by the wholesaler and the alcoholic beverages are returned to the shipper or destroyed prior to any sale by the wholesaler in this state;

(4) Alcoholic beverages have been destroyed while in the possession of a wholesaler within the state by an act of God, such as fire, flood, lightning, wind, or other natural calamity; or

(5) Wines have been sold by the wholesaler for delivery and consumption outside the state, provided the sale and delivery shall in all

respects comply with the requirements of Code Section 3-6-26.1.

(b) Any manufacturer, distiller, or wholesaler receiving a refund or credit for stamps purchased, in every case where the cost of the stamps has been charged or paid by the wholesaler, shall refund or credit to the wholesaler an amount equal to the credit or refund allowed by the commissioner.

APPENDIX 2

O.C.G.A. § 3-2-14. Limitations on refunds.

If, in the opinion of the commissioner, any refund application filed by an applicant for refund of taxes paid pursuant to this title contains a false statement or if the applicant is indebted to the state, the commissioner shall decline to approve the refund payment until the applicant has complied with the laws of this state. Payment of the refund shall be made, subject to this title, if the commissioner finds that the applicant is justly entitled to the refund. Nothing contained in this Code section shall be construed so as to allow for a refund of any license fee lawfully due or paid under this title.

APPENDIX 3

O.C.G.A. § 3-2-35. Seizure of contraband by commissioner and agents; proceedings upon seizure; hearing on entitlement to seized items; appeals; disposition of items upon which taxes have been paid.

(a) The commissioner and his agents shall seize and take possession of any contraband found in the possession of any person in violation of this title.

(b) Upon seizure, the commissioner or his agent shall give a receipt to the person from whom the contraband property was seized, if known, identifying the property seized and indicating from whom seized and the place of seizure.

(c) A copy of the receipt shall be:

(1) Filed in the office of the commissioner and shall be a public record open to public inspection; and

(2) Posted at the courthouse of the county in which the contraband was seized.

(d) Any person desiring to make claim to the contraband property shall file a claim with the commissioner at his office in Atlanta within ten days from the day of seizure. The commissioner, within 30 days of receipt of any such claim, shall afford the claimant a hearing in which to show his entitlement to the seized items. The burden of proof at such hearing shall be upon the claimant to establish his claim to the items seized and to show compliance with or justification for noncompliance with this Code section. The commissioner shall enter a written

order granting or denying the claim within 30 days from the date of the hearing.

(e) An appeal from the commissioner's order may be taken to the Superior Court of Fulton County by filing with the commissioner, within 15 days from the date of the decision, a notice of appeal to the Superior Court of Fulton County. The appeal shall be based upon the record made before the commissioner; and the commissioner, upon the filing of a notice of appeal, shall transmit the record and appropriate documents to the superior court within 30 days from the date of the filing of notice of appeal. The superior court shall review the record for errors of law, violation of constitutional or statutory provisions, violation of the statutory authority of the agency, lawfulness of the procedure, lack of any evidence to support the decision, and arbitrariness and abuse of discretion. However, the court shall not substitute its judgment for that of the hearing officer as to the weight of evidence on questions of fact.

(f) All alcoholic beverages upon which the taxes have been paid to either this state or any other state shall be disposed of as follows:

(1) In the case of malt beverage, the seized goods shall be destroyed by the commissioner or his authorized agent;

(2) In the case of wine, the seized goods shall be sold by the commissioner at public sale, except that, where seized wine is determined by the commissioner to be unfit for human consumption, it shall be destroyed;

(3) In the case of distilled spirits, the seized goods shall be sold by the commissioner

at public sale, except that, where seized distilled spirits are determined by the commissioner to be unfit for human consumption, the distilled spirits shall be destroyed.

(g) This Code section shall not apply to unlawfully manufactured alcoholic beverages.

APPENDIX 4

O.C.G.A. § 3-4-152. Submission of labels; designation of sales territories and exclusive wholesale distributors; approval by commissioner.

(a) Every manufacturer or shipper shipping distilled spirits for the first time into the state shall:

(1) Submit to the commissioner one label for each brand of distilled spirits to be shipped for the first time by the manufacturer or shipper into this state;

(2) Designate in the application for registration the sales territories for each of its brands sold in this state; and

(3) Name one licensed wholesaler in each territory who shall be the exclusive distributor of the brand within the territory.

(b) Designations of wholesalers and wholesalers' territories as provided in this Code section shall be initially approved by the commissioner and shall not be changed or initially disapproved except for cause. The commissioner shall determine cause after a hearing under regulations promulgated by the commissioner for such purposes.

APPENDIX 5

O.C.G.A. § 9-4-10. Equity jurisdiction not impaired.

Nothing in this chapter is intended to impair the equity jurisdiction of the superior courts of the state.

APPENDIX 6

O.C.G.A. § 9-11-15(a), (b) & (c). Amended and supplemental pleadings.

(a) *Amendments.* A party may amend his pleading as a matter of course and without leave of court at any time before the entry of a pretrial order. Thereafter the party may amend his pleading only by leave of court or by written consent of the adverse party. Leave shall be freely given when justice so requires. A party may plead or move in response to an amended pleading and, when required by an order of the court, shall plead within 15 days after service of the amended pleading, unless the court otherwise orders.

(b) *Amendments to conform to the evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of the evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(c) *Relation back of amendments.* Whenever the claim or defense asserted in the amended pleading arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back to the date of the original pleadings if the foregoing provisions are satisfied, and if within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

APPENDIX 7

O.C.G.A. § 48-3-1. Execution for collection of money due the state; affidavit of illegality.

The commissioner may issue an execution for the collection of any tax, fee, license, penalty, interest, or collection costs due the state. The execution shall be directed to all and singular sheriffs of this state or to the commissioner or his authorized representatives and shall command them to levy upon the goods, chattels, lands, and tenements of the taxpayer. Each sheriff shall execute the execution as in cases of writs of execution from the superior courts. Whenever any writ of execution has been issued by the commissioner, the taxpayer, in order to obtain a determination of whether the tax is legally due, may tender to the levying officer his affidavit of illegality to the execution and, upon his payment of the tax if required as a condition precedent by the law levying the tax or upon his giving a good and solvent bond in such an amount to cover the total of any adverse judgment plus costs where the law does not require the payment of the tax as a condition precedent, the levying officer shall return the affidavit of illegality, except as otherwise provided by law, to the superior court of the county of the taxpayer's residence. The affidavit of illegality shall be summarily heard and determined by the court.

APPENDIX 8

O.C.G.A. § 50-13-10. Declaratory judgment on validity of rules; venue for actions.

(a) The validity of any rule may be determined in an action for declaratory judgment when it is alleged that the rule or its threatened application interferes with or impairs the legal rights of the petitioner. A declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the regulation in question.

(b) The agency shall be made a party to the action and a copy of the petition shall be served on the Attorney General. The action shall be brought in the Superior Court of Fulton County or in the superior court of the county of residence of the petitioner. When the petitioner is a corporation, the action may be brought in the Superior Court of Fulton County or in the superior court of the county where the petitioner maintains its principal place of doing business in this state. All actions for declaratory judgment, however, with respect to any rule of the Public Service Commission must be brought in the Superior Court of Fulton County.

(c) Actions for declaratory judgment provided for in this Code section shall be in accordance with Chapter 4 of Title 9, the "Declaratory Judgment Act."

APPENDIX 9

O.C.G.A. § 50-13-13. Opportunity for hearing in contested cases; notice; counsel; subpoenas; record; revenue cases.

(a) In addition to any other requirements imposed by common law, constitution, statutes, or regulations:

(1) In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice served personally or by mail;

(2) The notice shall include:

(A) A statement of the time, place, and nature of the hearing;

(B) A statement of the legal authority and jurisdiction under which the hearing is to be held;

(C) A reference to the particular section of the statutes and rules involved;

(D) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time, the notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished; and

(E) A statement as to the right of any party to subpoena witnesses and documentary evidence through the agency;

(3) Opportunity shall be afforded all parties to be represented by legal counsel and to respond and present evidence on all issues involved;

(4) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default;

(5) Unless specifically precluded by statute, in addition to the agency, any contested case may be held before any agency representative who has been selected and appointed by the agency for such purpose. Before appointing a hearing representative, the agency shall determine that the person under consideration is qualified by reason of training, experience, and competence;

(6) The agency, the hearing officer, or any representative of the agency authorized to hold a hearing shall have authority to do the following: administer oaths and affirmations; sign and issue subpoenas; rule upon offers of proof; regulate the course of the hearing, set the time and place for continued hearings, and fix the time for filing briefs; dispose of motions to dismiss for lack of agency jurisdiction over the subject matter or parties or for any other ground; dispose of motions to amend or to intervene; provide for the taking of testimony by deposition or interrogatory; and reprimand or exclude from the hearing any person for any indecorous or improper conduct committed in the presence of the agency or the hearing officer;

(7) Subpoenas shall be issued without discrimination between public and private parties. When a subpoena is disobeyed, any party may apply to the superior court of the county where the contested case is being heard for an order requiring obedience. Failure to comply with such order shall be cause for punishment as for

contempt of court. The costs of securing the attendance of witnesses, including fees and mileage, shall be computed and assessed in the same manner as prescribed by law in civil cases in the superior court;

(8) A record shall be kept in each contested case and shall include:

(A) All pleadings, motions, and intermediate rulings;

(B) A summary of the oral testimony plus all other evidence received or considered except that oral proceedings or any part thereof shall be transcribed or recorded upon request of any party. Upon written request therefor, a transcript of the oral proceeding or any part thereof shall be furnished to any party of the proceeding. The agency shall set a uniform fee for such service;

(C) A statement of matters officially noticed;

(D) Questions and offers of proof and rulings thereon;

(E) Proposed findings and exceptions;

(F) Any decision (including any initial, recommended, or tentative decision), opinion, or report by the officer presiding at the hearing; and

(G) All staff memoranda or data submitted to the hearing officer or members of the agency in connection with their consideration of the case; and

(9) Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

(b) Except in cases in which a hearing has been demanded under Code Section 50-13-12, subsection (a) of this Code section and the other provisions of this chapter concerning contested cases shall not apply to any case arising in the administration of the revenue laws, which case is subject to a subsequent de novo trial of the law and the facts in the superior court.

APPENDIX 10

O.C.G.A. § 50-13-19. Judicial review of contested cases.

(a) Any person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. This Code section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(b) Proceedings for review are instituted by filing a petition within 30 days after the service of the final decision of the agency or, if a rehearing is requested, within 30 days after the decision thereon. The petition may be filed in the Superior Court of Fulton County or in the superior court of the county of residence of the petitioner. When the petitioner is a corporation, the action may be brought in the Superior Court of Fulton County or in the superior court of the county where the petitioner maintains its principal place of doing business in this state. All proceedings for review, however, with respect to orders, rules, regulations, or other decisions or directives of the Public Service Commission must be brought in the Superior Court of Fulton County. Copies of the petition shall be served upon the agency and all parties of record. The petition shall state the nature of the petitioner's interest, the fact showing that the petitioner is aggrieved by the decision, and the ground as specified in

subsection (h) of this Code section upon which the petitioner contends that the decision should be reversed or modified. The petition may be amended by leave of court.

(c) Irrespective of any provisions of statute or agency rule with respect to motions for rehearing or reconsideration after a final agency decision or order, the filing of such a motion shall not be a prerequisite to the filing of any action for judicial review or relief; provided, however, that no objection to any order or decision of any agency shall be considered by the court upon petition for review unless such objection has been urged before the agency.

(d) The filing of the petition does not itself stay enforcement of the agency decision. Except as otherwise provided in this subsection, the agency may grant, or the reviewing court may order, a stay upon appropriate terms for good cause shown. In contested cases involving a license to practice medicine or a license to practice dentistry in this state, a reviewing court may order a stay or an agency may grant a stay only if the court or agency makes a finding that the public health, safety, and welfare will not be harmed by the issuance of the stay.

(e) Within 30 days after the service of the petition or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

(f) If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material and there were good reasons for failure to present it in the proceedings before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(g) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(h) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

APPENDIX 11

O.C.G.A. § 50-13-20. Review of final judgment.

An aggrieved party may obtain a review of any final judgment of the superior court under this chapter by the Court of Appeals or the Supreme Court, as provided by law. In contested cases involving a license to practice medicine or a license to practice dentistry in this state, the filing of an application for appeal or a notice of appeal shall not by itself stay enforcement of the agency decision. In such cases, the superior court which considered the petition for judicial review or the Court of Appeals or the Supreme Court may order a stay only if such court makes a finding that the public health, safety, and welfare will not be harmed by the issuance of the stay.

APPENDIX 12

Ga. Revenue Rule 560-1-1-.10. Procedure for Declaratory Rulings.

Any person wishing to file a petition for a declaratory ruling as to the applicability of a statute or rule or order pursuant to Section 12 of the Administrative Procedure Act shall submit three copies of the petition, in writing, to the Department of Revenue, State Office Building, Atlanta, Georgia, stating all of the facts, including the names of those parties involved in the fact situation, the amount of tax involved and a presentation of the legal issue sought to be resolved. The Department will not issue a declaratory ruling on a hypothetical fact situation and any ruling requested must affect a specific fact situation and specific parties.

APPENDIX 13

Ga. Revenue Rule 560-1-1-.11. Taxpayers Demand for Hearing.

(1) Any taxpayer desiring a hearing in any contested case may demand such a hearing by petitioning the Commissioner for such a hearing.

(2) The petition must be in writing and marked or labeled on the front thereof "DEMAND FOR HEARING". The taxpayer must file an original and two copies of the petition in person or by mail addressed to the State Revenue Commissioner, State Office Building, Atlanta, Georgia.

(3) The petition must state:

(a) the names of all parties involved;

(b) the act or failure to act complained of;

(c) a brief statement of the facts;

(d) the amount of the tax involved;

(e) in what respect such taxpayer is aggrieved;

(f) the grounds to be relied upon as a basis for the relief demanded;

(g) the relief requested.

APPENDIX 14

Ga. Revenue Rule 560-1-1-.12. Informal Conference.

Informal conferences may be had with the Commissioner or Unit Director or other employee at the discretion of the Department. An informal conference is not a hearing as defined in the Administrative Practice Act and will not prejudice the rights of any taxpayer or the Department.

APPENDIX 15

Ga. Revenue Rule 560-1-1-.13. Hearings in Contested Cases.

Upon receipt of a "DEMAND FOR HEARING" (See Rule 560-1-1-.11) The [sic] Commissioner will refer the matter in writing to the hearing officer or representative of the agency who will hold the hearing demanded. The date and place of the hearing will be set by such hearing officer or agency representative who will notify all parties involved.

APPENDIX 16

Ga. Revenue Rule 560-1-1-.14. Rules of Practice.

Contested cases which are not subject to a subsequent trial of the law and facts de novo in Superior Court shall be conducted in accordance with the requirements of the Georgia Administrative Practice Act. Generally cases instituted by the Department of Revenue are subject to subsequent de novo trial.

APPENDIX 17

GA. REVENUE RULES CHP. 560-2-9.

ALCOHOLIC BEVERAGE LICENSE HEARINGS

560-2-9-.01 Applicability of These Rules.

The rules in this Chapter shall apply to and govern only those administrative hearings regarding alcoholic beverage licenses as follows:

(a) Any hearing to be held as a result of any citation against any holder of an alcoholic beverage license issued under the provisions of the Georgia Alcoholic Beverage Code for the alleged violation of any law, rule or regulation concerning the manufacture, sale, use, possession or disposition of alcoholic beverages in this State.

(b) Any hearing requested or afforded as the result of the denial of any application, or the refusal to issue or renew any alcoholic beverage license issued under the provisions of the Georgia Alcoholic Beverage Code.

(c) These rules shall not apply to all other administrative hearings arising out of the Alcoholic Beverage Code which are governed by and conducted under the provisions of the Georgia Administrative Procedure Act.

560-2-9-.02 Persons Authorized To Hold Hearings; Authority of Hearing Officer.

Administrative hearings referenced in these rules will be held by a Hearing Officer appointed by the Commissioner to hear such cases. When any person other than the Commissioner acts as Hearing Officer in such matters, the Hearing Officer's actions, decisions and orders shall be deemed to be on behalf of the Commissioner and

effective as though taken by the Commissioner, subject to the appeals procedures as hereinafter provided. The Hearing Officer shall be empowered to exercise the same degree of authority and to do the same acts as hearing officers empowered under the Georgia Administrative Procedure Act, O.C.G.A. § 50-13-13.

560-2-9-.03 Nature of the Proceeding; Hearing Procedure; Burden of Proof.

The hearings held under these Rules shall be only as formal as is necessary to preserve order and be compatible with the principles of justice. Where the Department is the charging party, a representative shall first present the Department's case and the licensee or applicant will then have the opportunity to present his case, to rebut the allegations made against him and present whatever defenses he has. All parties shall have the right to be represented by legal counsel and to subpoena witnesses and documentary evidence through the agency. The parties shall have the right to respond and present evidence on all issues involved and to cross examine all witnesses. The standard of proof on all issues in the hearing shall be a preponderance of the evidence and a determination will be made on the basis of the competent evidence presented at the hearing. Except in such matters wherein the burden of proof is upon a specific party as provided by law, such burden of proof shall be upon the charging or petitioning party.

560-2-9-.04 Evidence; Official Notice.

The rules of evidence in hearings covered by this Chapter shall substantially be as follows:

(a) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in the trial of civil non-jury cases in the superior courts shall be followed as far as practicable. When necessary to ascertain facts not reasonably susceptible of proof under such rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs;

(b) Documentary evidence may be received in the form of copies or excerpts if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original or have it established as documentary evidence according to the rules of evidence applicable to the superior courts of this state;

(c) A party may conduct such cross-examination as shall be required for a full and true disclosure of the facts;

(d) Official notice may be taken of judicially recognizable facts and generally recognized technical facts or records within the agency's specialized knowledge. The parties shall be notified of any material so noticed and shall be afforded the opportunity to contest such material.

560-2-9-.05 Executive Orders.

As soon as possible after the close of a hearing, the Hearing Officer shall issue an Executive Order in the case and forward same to the Enforcement Section of the Alcohol and Tobacco Tax Unit for service and execution. The Order shall contain the determination of the Hearing

Officer and any penalties to be imposed as a result of the proceeding. Unless the execution of the Order is stayed by the Commissioner or Hearing Officer, the execution of the Order is to be effective on the date specified in the Order or upon service of the Order if no other effective date is so specified.

560-2-9-.06 Intra-Agency Appeal Procedure; Post Hearing Motions.

The following two-step appeal procedure shall be the exclusive administrative remedy for appealing decisions entered pursuant to these regulations.

(a) *Request for Reconsideration:* A licensee or applicant who is aggrieved by the Executive Order entered by the Hearing Officer, may appeal by filing a Request for Reconsideration with the Hearing Officer who heard the case no later than 10 days after service. The Hearing Officer shall review the request and thereafter either deny the request or modify the initial Executive Order by an Order on Reconsideration.

(b) *Motion for Review:* Provided a timely Request for Reconsideration was filed with the initial Hearing Officer, a licensee or applicant shall have 10 days from the date of receipt of the Hearing Officer's Order on Reconsideration (or denial of request), to file with the State Revenue Commissioner, a written Motion for Review. Such motion shall set forth a concise statement of the basis upon which the appeal is made together with supporting argument setting forth any enumeration of erroneous conclusions of law or determination and any claim that the Executive Order contains an exercise of discretion or policy which is of such importance that the Commissioner should, in his

discretion, review. No evidence outside the record shall be considered. After due consideration and as soon as practicable, the Commissioner or his designee shall either grant or deny the Motion for Review. If the Motion is denied, the Hearing Officer's Executive Order shall automatically become the Final Decision of the Agency. If the Motion is granted, the Commissioner will either remand the case to the Hearing Officer for additional proceedings or issue a Final Order either modifying or upholding the Executive Order. Except in the case of an Order remanding the case, either the Commissioner's Final Order, or the Commissioner's denial of a Motion for Review entered pursuant to this procedure shall constitute final agency action and shall not be further appealable within the Revenue Department.

(c) *Application to Stay Execution of Order:* The filing of a Request for Reconsideration or Motion for Review does not automatically, of itself, stay the execution and enforcement of any Order of the Hearing Officer or Commissioner. However, a request to stay the execution and enforcement of any Order may be made with the Request for Reconsideration or Motion for Review and the Hearing Officer or Commissioner may grant such request to stay upon appropriate terms for good cause shown.

(d) *Waiver of Administrative Appeal:* The failure of any party to follow the intra-agency appeal procedure as outlined in this Rule shall constitute a waiver of agency appeal rights and the Hearing Officer's Executive Order shall automatically become the Final Order of the Commissioner 10 days after service of the initial Order.

560-2-9-.07 Continuances and Postponements.

Matters set for hearing may be continued or postponed within the sound discretion of the Hearing Officer upon timely motion by either party or by the Hearing Officer on his own motion.

560-2-9-.08 Subpoena Forms; Service.

Either party may obtain subpoena forms from the Hearing Officer by making a timely request for same. The service, proof of service and enforcement of subpoenas shall be as provided by law and shall be the responsibility of the party requesting the subpoena.

560-2-9-.09 Transcripts of Hearing.

Any party may request that the hearing be conducted before a court reporter. The request shall be in writing and include an agreement by the requesting party that he shall pay the costs incurred by the request or that he shall procure at his own cost and on his own initiative, the court reporting services for the hearing. Regardless of who makes the arrangements or requests the transcript be made, the original transcript of the proceedings shall be submitted to the Hearing Officer prior to the close of the hearing record if such transcript is to be made part of the record.